INDEX

	Page
I. The substantiality of the monopolization issue	1
II. The substantiality of the price-fixing issue	5
Conclusion	8

CITATIONS

Cases:

American Tobacco Co. v. *United States*, 328 U. S. 781	3, 4
Interstate Circuit, Inc. v. *United States*, 306 U. S. 208	7
Theatre Enterprises, Inc. v. *Paramount Film Distributing Corp.*, 346 U. S. 537	6, 7
United States v. *Aluminum Co. of America*, 148 F. 2d 416	3
United States v. *duPont*, 351 U. S. 377	3
United States v. *Griffith*, 334 U. S. 100	3, 4
United States v. *Masonite Corp.*, 316 U. S. 265	7
United States v. *U. S. Gypsum Co.*, 333 U. S. 364	7
United States v. *W. T. Grant Co.*, 345 U. S. 629	5

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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 160

UNITED STATES OF AMERICA, APPELLANT

v.

NATIONAL MALLEABLE & STEEL CASTINGS CO., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

BRIEF FOR THE UNITED STATES IN OPPOSITION TO THE DEFENDANT MANUFACTURERS' MOTION TO AFFIRM

I. THE SUBSTANTIALITY OF THE MONOPOLIZATION ISSUE

Appellees'[1] motion to affirm does not deny that they have both a complete monopoly of commerce in the standard coupler and its parts, and power to exclude others from such commerce. They do not deny our statements that the essential characteristic of the standard coupler is that each of its six basic parts

[1] We use the word "appellees" to apply to the appellees referred to in the jurisdictional statement as the defendant manufacturers, namely, National Malleable and Steel Castings Co., The Buckeye Steel Castings Company, The Symington-Gould Corporation (present name, Symington Wayne Corporation), and McConway & Torley Corporation.

is interchangeable regardless of which manufacturer was the producer; that to achieve this interchangeability a manufacturer must know the exact dimensions required for each part and be able to use the standard test (master) gauges developed by the Mechanical Committee; and that access to these gauges and to the required dimensions is within the appellees' "exclusive control" (J. St. 13).

Appellees' defense of the district court's ruling on the monopolization issue is grounded on the determination which the court is alleged to have made with respect to "the *subjective* issue of the general *intent* of the appellee manufacturers" (Motion 9). We submit, however, that the district court's own findings establish the existence of the only intent that is presently material, namely, appellees' intent to keep in their own hands *power* to exclude competitors. Its findings recognize that the drawings and gauges requisite to manufacture of the standard coupler and its parts were under the "control of" appellees' joint creature, the Mechanical Committee, and that appellees, in furnishing the Association of America Railroads (AAR) with one set of these drawings, marked them "Reproduction or distribution prohibited without authority of Chairman of Mechanical Committee" (fng. 36). This prohibition against distribution and reproduction plainly was a deliberate and intended reservation of power to deny access to these drawings, which reservation of power necessarily comprehended power to exclude others from the industry.

It is, we believe, firmly settled that possession of power to raise prices or to exclude competitors is the

essential element of the monopolization of trade and commerce condemned by Section 2 of the Sherman Act and that, in order to establish a violation of the section, the only intent that need be shown is an intent to acquire or retain such power. The "material consideration" in determining whether there has been illegal monopolization is whether "power exists to raise prices or to exclude competition when it is desired to do so." *American Tobacco Co.* v. *United States,* 328 U. S. 781, 811. While, in order to violate Section 2, there must be both power to monopolize and intent to monopolize, the requisite intent means no more than a purpose to acquire or retain power to monopolize. *United States* v. *Aluminum Co. of America,* 148 F. 2d 416, 432 (C. A. 2). No finding of "specific intent" to build a monopoly, in the sense in which the common law used the term "specific intent", is necessary to establish a violation: it is sufficient that monopoly is the consequence of the defendants' conduct; the forbidden end is then deemed purposeful in that "no monopolist monopolizes unconscious of what he is doing." *United States* v. *Griffith,* 334 U. S. 100, 105. Or, as otherwise stated, if "the necessary and direct consequence" of what was done is monopoly or monopolistic power, those so acting are "chargeable in legal contemplation with" purpose to accomplish this result. *Id.* at 108. In this sense, an intention to monopolize "may be assumed" when an alleged monopolist has "power over price and competition." *United States* v. *duPont,* 351 U. S. 377, 392.

In the instant case, there is neither finding nor evi-

dence that appellees lacked intent to retain for themselves power to exclude competitors. And, under the holding in *Griffith* (334 U. S. at 106, 109), support for the court's resolution of the monopoly issue may not be grounded on its generalized finding that none of appellees has any "intent to monopolize" the manufacture or sale of standard couplers (fng. 78). Moreover, the finding as to intent, and the court's determination of the monopolization issue, are to be judged in the light of the absence of any reference, in the court's lengthy opinion, to decisions of this Court dealing with monopolization or to the tests and principles which it has applied. We mention, to illustrate, the significance which the court below apparently attached to its conclusion that there had been no actual exclusion of competitors,[2] whereas this Court has specifically held (*American Tobacco,* 328 U. S. at 810)—

> Neither proof of exertion of the power to exclude nor proof of actual exclusion of existing or potential competitors is essential to sustain a charge of monopolization under the Sherman Act.

Since the issue raised by the Government's appeal is whether illegal monopolization continued up to the date of trial, appellees are plainly mistaken in relying upon the doctrine that, where the defendant has

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[2] "Not once in all these weeks of trial have we learned of anybody in particular who desired to actually get into this business and who had the competency to get in the business, who was kept out.

"I find that nobody ever wanted to get in. I find that nobody was kept out." (Opinion, J. St. 53.)

abandoned the charged illegal conduct and has unequivocably disclaimed any intention to renew it, the trial court has wide discretion in determining the need for granting injunctive relief.[3] We are aware of no decision holding that, where a current violation of the Sherman Act has been shown, the district court has discretion not only to deny all relief but to dismiss the Government's complaint. In any event, this kind of discretion was not exercised since the district court concluded that the evidence showed no violation of the statute.

We note briefly the district court's observation, to which appellees repeatedly refer (Motion 6, 11, 13, 14), that the railroad industry is "in a condition of contraction". The court reached this conclusion on the basis of "common knowledge" or "public knowledge" (J. St. 55–56), and the one item of evidence which appellees cite in support, Pltf. Ex. 1200–1827 (Motion 6), fails to show contraction in freight cars.[4]

II. THE SUBSTANTIALITY OF THE PRICE-FIXING ISSUE

Appellees, in urging that the price-fixing aspects of the case present no substantial question, point to the

[3] See the Motion at p. 7, and the citation of *United States* v. *W T. Grant Co.*, 345 U. S. 629.

[4] The exhibit shows, as appellees state, that the number of all freight-carrying cars was about 54,000 less in 1955 than in 1951. But in view of substantial year-to-year variations, it is more reliable to compare one five-year period with another than to compare two selected years. For the period 1946 through 1950 the yearly figures of all freight-carrying cars total 8,711,891, whereas for the period 1951 through 1955 the total of the yearly figures is 8,723,085. Thus, there was no contraction, and rather a slight expansion, in the later period.

testimony by their officers denying the existence of any agreement to fix prices, and assert that appellant is asking this Court to hold that, notwithstanding such testimony, the price uniformity and price leadership here shown establish illegal price fixing. Their final contention (Motion 26) is that this case is "squarely within" the holding in *Theatre Enterprises, Inc.* v. *Paramount Film Distributing Corp.*, 346 U. S. 537, 541 that parallel business behavior does not "conclusively establish * * *" or "itself constitute * * *" a violation of the Sherman Act.

The Government's case does not rest exclusively, or even primarily, on parallel conduct. It comprises, among other things:

(1) Continuation of precisely the same method of pricing—involving a freight equalization scheme, differently applied in two rigidly defined zones—previously employed for some 25 years pursuant to an express price-fixing agreement among the same parties;

(2) A price leader which played the same role and followed the same procedures as during the period of express price-fixing;

(3) Distribution by the price leader to competitors of its "freight differential list", which it computed on the basis of information known only to it and which was essential to effectuation of appellees' freight equalization scheme;

(4) During a period of more than 10 years, initiation of price changes solely by the price leader, and its distribution to competitors of its price changes at

or about the date of announcement and in advance of the effective date of the announced price change;

(5) Meetings at which appellees' principal officers discussed the factors affecting coupler prices and, on several occasions, urged the price leader to increase prices;

(6) A campaign by the price leader, in advance of its adoption and announcement of a material change in the basis of pricing, to convince its competitors of the wisdom of the change.

We submit, therefore, that the price-fixing issue presented by the appeal differs widely from the question considered in *Theatre Enterprises, i. e.,* whether violation of the Sherman Act was established by evidence showing that each major motion picture distributor had, on the basis of substantial business reasons applicable to all, adopted the policy of restricting the grant of first-run motion-picture licenses in Baltimore to the eight downtown Baltimore theatres, plus uncontradicted testimony that each distributor had independently adopted this policy. There, but not here, parallelism of conduct constituted the sole basis for finding combination or conspiracy.

We believe, as previously stated (J. St. 19), that the appeal presents a substantial and important issue as to whether appellees' price-fixing is governed by the principles applied in such cases as *Interstate Circuit, Inc.* v. *United States,* 306 U. S. 208; *United States* v. *Masonite Corp.,* 316 U. S. 265; and *United States* v. *U. S. Gypsum Co.,* 333 U. S. 364, or the principles found to be controlling in *Theatre Enterprises, supra.*

CONCLUSION

For the foregoing reasons, we submit that appellees' motion to affirm should be denied.

Respectfully submitted.

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